August 12, 2005 FILE NO. – 2004/054

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005 – 006

Saskatchewan Liquor and Gaming Authority

Summary: The Applicant applied under *The Freedom of Information and Protection of Privacy Act* (the "Act") for a copy of a 2003 customer satisfaction survey relating to retail liquor stores operated by a government institution. The survey was prepared by a third party. The government institution withheld portions of the record invoking section 18(1)(b) of the Act, but released the remainder to the Applicant. The Commissioner found the denial of the severed portions of the record by the body to be authorized pursuant to the Act.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], s. 18(1)(b); Ontario's *Freedom of Information and Protection of Privacy Act* [R.S.O. 1990, c. F.31, as am]; and Alberta's *Freedom of Information and Protection of Privacy Act* [R.S.A. 2000, c. F-25 as am]

Authorities Cited: Ontario's Information and Privacy Commissioner (IPC) Order P-219, Ontario IPC Order MO-1282, Ontario IPC Interim Order P-1281; and Alberta Information and Privacy Commissioner's Order 96-013

I BACKGROUND

[1] The Applicant made application under the Act for documents in the possession or control of Saskatchewan Liquor and Gaming Authority[1] (SLGA), a government institution. On May 5, 2004, SLGA received the prescribed form that requested, "*Please provide a copy of a 2003 survey relating to retail liquor stores operated by SLGA. The survey was administered to a random sample of 1,500 Saskatchewan residents. Please include questions, results, and cost of the survey.*"

[2] On June 7, 2004, SLGA responded to the Applicant and provided information as to the cost of the survey prepared by Fast Consulting. The government institution provided the Applicant with a copy of the 2003 survey results, but with sections severed and cited section 18(1)(b) for its authority to withhold.

[3] The Applicant requested a review pursuant to section 49 of *The Freedom of Information and Protection of Privacy Act* ("the Act"). Our office provided notification to the parties of our receipt of said request on July 5, 2004.

II RECORDS AT ISSUE

[4] The record at issue is a customer satisfaction survey entitled, "*Saskatchewan Liquor and Gaming Authority Customer Satisfaction Survey, June 2003*". SLGA released the survey, but severed numerous sections detailing the shopping patterns and purchases of SLGA customers. The Applicant received most of the survey including some of the findings, statistics, graphs, and all of the survey questions.

III ISSUES

Did the government institution have authority under section 18(1)(b) of *The Freedom of Information and Protection of Privacy Act* to withhold portions of the record?

[1] SLGA is "*a Treasury Board Crown Corporation responsible for the distribution, control and regulation of liquor and most gaming across the province*" [Available online: www.slga.gov.sk.ca]

IV DISCUSSION OF THE ISSUES

[5] The government institution raised an additional discretionary exemption during the review process. In accordance with our interpretation of section 7 of the Act, discretionary exemptions should be identified in the institution's original response to the Applicant, not during a formal review by our office.

[6] Our office previously addressed the issue of raising new discretionary exemptions after a review has been undertaken in paragraphs [15] and [16] of our Report No. 2004-007[2]. Those paragraphs read, as follows:

> *"[15] It is important that the government institution accurately identify the specific exemptions that it is relying upon in denying access. In this particular case, the Applicant is a Saskatchewan journalist who would be considered a 'sophisticated' Applicant very familiar with the Act and its application. The confusion may be less because of the Applicant's familiarity with the statute however this cannot relieve the government institution of its responsibility to communicate clearly to an applicant why access is denied.*
>
> *[16] Our office will normally only consider a discretionary exemption that the government institution has invoked in its original response to an applicant. We would only consider a new discretionary exemption if we can be satisfied that there is no undue delay or prejudice to the applicant."*

[7] Our office will only consider additional discretionary exemptions raised by the body after hearing from the Applicant on the question of prejudice and after consideration of any resultant delays experienced or anticipated by the Applicant.

[8] After informing SLGA of this practice, the government institution informed our office that it did not intend to pursue the matter of the new discretionary exemption.

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[2] Available Online: www.oipc.sk.ca under Reports tab

[9] SLGA takes the position that section 18(1)(b) of the Act authorizes them to withhold sections of the record from disclosure.

[10] Section 18(1) of the Act reads as follows:

> *"18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:*
>
> ...
>
> *(b) financial, commercial, scientific, technical or other information:*
>
> *(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and*
>
> *(ii) that has monetary value or is reasonably likely to have monetary value;"*

Each part of the three part test above must be satisfied in order for the severed portions of the record to qualify for exemption under this provision.

Does the government institution have a right of use or proprietary interest in the information at issue?

[11] Black's Law Dictionary defines "proprietary interest" as, "*the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares.*"[3]

[12] Also helpful in determining this issue is Ontario's Information and Privacy Commissioner (IPC) Order MO-1282 that reads, in part, as follows:

> *"With reference to the meaning of the phrase "belongs to", Assistant Commissioner Tom Mitchinson stated in Order P-1281:*
>
> ...
>
> *I do not accept these submissions. In my view, the fact that a government body has authority to collect and use information, and can, as a practical*

[3] Garner, B., *Black's Law Dictionary, Seventh Edition.* WestGroup, 1999, Page 816

> *matter, control the physical access to information, does not necessarily mean that this information "belongs to" the government with the meaning of 18(1)(a). While the government may own the physical paper, computer disk or other record on which the information is stored, the Act is specifically designated to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the Act, within limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.*
>
> *If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone...*

Similarly, in his earlier Order P-114, the Assistant Commissioner stated:

> *Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merely acts as a repository of information supplied by these external sources for regulatory purposes.*

The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636),

customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, Lac Minerals Ltd. v. Int. Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].

In my view, the information in the record is clearly different in nature from the type of information described above. The Township cannot be said to have acquired an ownership interest in the information in an intellectual property or confidential business information sense. There is nothing in the material before me to indicate that the Township has expended money or applied skill and effort to develop the information, or that there is an additional "value-added" component to it, which might suggest that it "belongs to" the Township. While this information is not now generally known, it cannot be said to have the necessary quality of confidence about it where the Township has not demonstrated that it will be deprived of any monetary value in the information as a result of its disclosure (Order M-654). The material before me does not establish that disclosure of the information in the record could reasonably be expected to result in the Township not being able to rely on the terms of the letter of credit to receive payment from the financial institution. "

[13] The information in question has been treated by SLGA as confidential business information.

[14] By letter dated June 7, 2004 SLGA provided the following information in respect to costs incurred for the service provided by the third party:

"*Fast Consulting from Saskatoon completed a customer satisfaction survey for SLGA in June 2003 following a tendering of a request for proposal (RFP) and*

formal RFP evaluation. The total paid by SLGA to Fast Consulting for the study was $35, 753.85."

[15] As SLGA paid Fast Consulting for the work done and the resultant survey report contains customer information, the government institution has a clear proprietary interest and right of use to these materials.

Is the severed information commercial in nature?

[16] We must determine what the nature of the information is to determine if the government institution meets this part of the test.

[17] SLGA's June 7, 2004 letter provides that, "*...portions of the survey have been severed where this information is considered to be commercial information in which SLGA has a proprietary interest and which has a monetary value.*"

[18] Our office reviewed the record in severed and original form on July 15, 2004. The severed portions consistently contained details of customers' shopping patterns and purchases. These are described by SLGA as "customer preferences and profiles."

[19] No previous Reports of this office provide assistance in the interpretation of section 18(1)(b) of the Act, so our office will consider the relevant findings in other jurisdictions.

[20] In Alberta, the relevant section of the *Freedom of Information and Protection of Privacy Act*[4] provides as follows:

> *"25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> ...

[4] R.S.A. 2000, c. F-25

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value."

[21] A useful publication[5] from Alberta affirms that "commercial information" includes *"information relating to the buying, selling or exchange of merchandise or services. This includes third party associations, past history, references and insurance polices (see IPC Order 98-006) and pricing structures, market research, business plans, and customer records (see IPC Order 96-013). To determine whether the information in question is commercial information, the record needs to be viewed as a whole (see IPC Order 98-006). An agreement between two business entities may contain commercial information (see IPC Order 2001-019). "*

[22] In Order 96-013, Alberta's Information and Privacy Commissioner determined the following:

*"**Part 1: Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party? (Section 15(1)(a))***

(p. 14.) In the case of Air Atonabee Ltd. v. Canada (Minister of Transport) (1989)F.J.C. No. 453 MacKay J. considered the meanings of the words "finance, commerce, science or technical matters" and held that "...dictionary meanings provide the best guide...". This approach was followed in Information Commissioner of Canada v. Minister of External Affairs [1990] 3 C.F. 665. I agree that those words should be given their ordinary dictionary meanings under section 15(1).

(p. 15.) I might add that it is not sufficient for a document to simply be given the title of "commercial or financial information", for example. Careful consideration must be given to the content of the documents to decide whether or not the information actually falls within section 15(1)(a). This approach was adopted by the Ontario Commissioner in Order P-394 [1993] O.I.P.C. No. 2.

[5] *Freedom of Information and Protection of Privacy Guidelines and Practices* (2005), Alberta Government Services page 181

(p. 16.) The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191). These are important for the purposes of this inquiry.

(p. 17.) Using the above as a guideline, I am satisfied that both the public body and the third party have provided sufficient evidence to show that Records 1 to 4 contain financial and commercial information."

[23] In Ontario, the relevant section of the *Freedom of Information and Protection of Privacy Act*[6] is as follows:

"*18(1) A head may refuse to disclose a record that contains,*

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;"

[24] Ontario's Information and Privacy Commissioner Interim Order P-1281 provides even further clarification on what constitutes commercial information. It reads, in part as follows:

"*The term "commercial information" was originally considered by former Commissioner Sidney B. Linden in Order 16, one of the first orders issued under the Act in 1988. In that order Commissioner Linden states:*

The Act does not define the term "commercial", and I have looked to other sources for guidance.

The seventh edition of the Concise Oxford Dictionary defines "commercial" as follows:

"Of, engage in, bearing on, commerce".

"Commerce" is defined as follows:

"Exchange of merchandise or services ... ... buying and selling".

[6] R.S.O. 1990, c.F.31

Black's Law Dictionary (fifth edition) defines "commercial" as:

"Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."

The records at issue contain no information concerning the buying or selling of goods and therefore, in my view, do not qualify as "commercial" information. While not an exhaustive list, the types of information that I believe would fall under the heading "commercial" include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

The approach taken by former Commissioner Linden has been adopted in many subsequent orders, where commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" has also been found to apply to both profit-making enterprises and non-profit organizations, and to have equal application to both large and small enterprises."

[25] We will define commercial activity in a similar fashion as noted above.

[26] I find that the withheld portions of the record contain "commercial information".

Does the information have monetary value, or is it reasonably likely to have monetary value?

[27] The design of this part of the exemption is to protect information which may or will reasonably have monetary value. Ontario's Information and Privacy Commissioner Order P-219, sets out some considerations in determining if information has monetary value. The relevant parts of the Order include:

"*At page 21 of Order 87 (Appeal Number 880082), dated August 24, 1989, Commissioner Linden set out the test which must be met in order to meet the requirements of subsection 18(1)(a):*

... the head must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; and

2. belongs to the Government of Ontario or an institution; and

3. has monetary value or potential monetary value.

I find that each of the records contains commercial information, and therefore satisfies the first part of the test. I find that the information belongs to the institution, as well as to the affected parties. With respect to the third part of the test, whether the information has monetary value or potential monetary value, the institution submits:

The information has monetary value or potential monetary value in that it can be sold to competitors of these parties and Stadco for their use in negotiations with Stadco and these parties... The information also has monetary value or potential monetary value to the competitors because... the information can be used to extract more beneficial financial and commercial terms to the competitor.

In my view, this argument centres on the economic interests of the institution and the effect that disclosure would have on the institution's ability to competitively negotiate with other parties. Accordingly, I will address this argument in my consideration of subsection 18(1)(c).

...

In my view, the use of the term "monetary value" in subsection 18(1)(a) requires that the information itself have an intrinsic value. As I see it the purpose of subsection 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information."

[28] I am of the same opinion and will apply this reasoning in consideration of the exempt material.

[29] Also of relevance is from the earlier referenced Alberta Government publication[7] that states, *"Monetary value may be demonstrated by evidence of potential for financial return to the public body or government."*

[30] In a letter dated August 4, 2004, SLGA responded to the question of monetary value by submitting the following:

> *"The severed information in question pertains to survey research undertaken to establish customer preferences and profiles used to assist with marketing beverage alcohol and meeting our customers' expectations for service and product selection. There are other entities retailing beverage alcohol in Saskatchewan (SLGA franchises and commercial permittees with off-sale endorsements) which receive from SLGA discounts and/or commissions on the majority of products they sell to customers. As a result, the customer profile/preferences information has commercial value to SLGA, and [its disclosure could be detrimental to the economic interests of SLGA]."*

[31] The Applicant counters the government's position by letter to our office dated September 1, 2004. The argument posed reads as follows:

> *"…regarding the claim exemption of Section 18(1)(b): SLGA cites the section, but shows no rationale, evidence or other argument on how the severed portions of the survey comes under this section. Indeed, SLGA could just as easily have claimed that the survey, in its entirety, was "commercial" and exempted under Section 18(1)(b). Notwithstanding that a head has some discretion on the matter, SLGA should not be allowed to randomly – it would seem – assign elements of the survey to the exemptions and not others. It must, at minimum, provide a rationale for how the severed portions fall into the exemption."*

[32] The current marketplace in Saskatchewan consists of *"more than 700 liquor outlets in more than 400 communities across the province. SLGA operates 81 liquor stores in 64 communities across the province. In addition, SLGA has granted 189 small businesses in rural Saskatchewan a franchise to sell beverage alcohol on its behalf. There are also*

[7] Supra, note 5, page 181

approximately 485 permitted hotels and brew pubs in Saskatchewan that can sell beverage alcohol for off-site consumption.

...

All beverage alcohol sold at SLGA liquor stores and franchises are subject to SLGA pricing. Off sale retailers use an open pricing system and can adjust their prices as they choose.[8]"

[33] I find that this information qualifies as information that has monetary value or is reasonably likely to have monetary value.

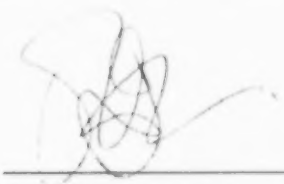
[34] If the severed information was released, it would most likely become public making it accessible free of charge to the benefit of SLGA competitors.

V RECOMMENDATIONS

[35] I find that SLGA properly invoked section 18(1)(b) of the Act when it withheld sections of the record.

[36] I recommend that SLGA continue to deny access to the withheld sections of the record pursuant to the Act.

Dated at Regina, in the Province of Saskatchewan, this 12th day of August, 2005.



R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan

[8] *Fact Sheet: Beverage Alcohol in Saskatchewan*. Saskatchewan Liquor and Gaming Authority. [Available online: http://www.slga.gov.sk.ca/Prebuilt/Public/Beverage%20Alcohol%20Fact%20Sheet.pdf]